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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 555

GEORGIA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

VS.

UNITED STATES OF AMERICA, ET. AL.,
Appellees

BRIEF FOR APPELLANTS, STATE HIGHWAY BOARD, ET AL.

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JURISDICTION

Title 28, U.S.C.A., Section 345, and State of Alabama vs. United States, 279 U.S. 229, show jurisdiction and probable jurisdiction has been found to exist.

STATEMENT OF THE CASE

Appellants brought suit in the District Court to enjoin and set aside the order of the Interstate Commerce Commission which fixed minimum rates for the transportation intrastate in Georgia on chert, clay, sand and gravel, etc. At the hearing upon the interlocutory injunction the evidence considered by the Commission was not introduced. Considering only such questions as arose upon the face of the order and of the findings of fact preliminary to it, the

three-judge Court denied an interlocutory injunction (R. 162; 39 F. (2d) 167). Upon final hearing the three-judge Court dismissed the bill (R. 172) and filed an opinion (R. 168, 42 F. (2d) 467), and this appeal was brought (R. 172).

The proceeding out of which the order here assailed grew was instituted in 1925 by the Interstate Commerce Commission under Section 13 of the Act (R. 89) to determine whether the rates which the railroads were then required by the Georgia Commission's order of February 25, 1925 to maintain on traffic within Georgia upon chert, clay, sand, gravel, etc., resulted in undue preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or an unjust discrimination against interstate or foreign commerce; and, if so, what rates should be prescribed to cure the situation (R. 90). Several complaint cases and one investigation and suspension proceeding were heard with the title case on one record and one report issued January 21, 1927, 122 I.C.C. 133 (R. 12 to 76). This report found that the order of the Georgia Commission of February 25, 1925 did not bring about a rate situation which had in the past been unjustly discriminatory against interstate commerce and no finding was made or order entered for the future insofar as unjust discrimination against interstate commerce was concerned. (R. 59). A new scale of maximum reasonable interstate single line and joint line distance rates was prescribed in the order of January 21, 1927 for application between points in Georgia and points in other states.

Subsequently and on March 13, 1928, the Georgia

Commission promulgated an order prescribing a new set of rates on the aforesaid commodities within Georgia, which rates were higher than the rates prescribed in its former order of February 25, 1925 (R. 76). Upon petition of the railroads, the Interstate Commerce Commission, by order of June 4, 1928 (R. 86), reopened the original investigation for further hearing to determine the sole question of whether the rates and minimum weights which the railroads were required to maintain on the commodities specified within Georgia under the order issued by the Georgia Commission on March 13, 1928 were unlawful in their relationship to the interstate rates and minimum weights which had been prescribed as reasonable on the same commodities in the original report of the Interstate Commerce Commission, 122 I.C.C. 133. Additional hearings were had and on December 9, 1929, the Interstate Commerce Commission rendered its report, 160 I.C.C. 309 (R. 88 to 118); finding that the rates fixed in the order of the Georgia Commission of March 13, 1928 were unduly prejudicial to interstate shippers, unduly preferential of intrastate shippers and unjustly discriminatory against interstate commerce to the extent that the state rates were lower, distance considered, than the interstate rates prescribed in the first report of the Interstate Commerce Commission, 122 I.C.C. 133; *no* finding was made that the minimum weights prescribed by the Georgia Commission were unlawful; the Commission said that the record did not afford a sufficient basis for a finding of undue prejudice respecting the rates from Chattanooga (R. 110 to 112).

The order of the Commission required the railroads to publish, maintain and apply to the intrastate transportation of sand, gravel, clay gravel, crushed

stone and slag, in carloads, between points in the State of Georgia rates which should not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities and which rates had been previously found and prescribed as reasonable (R. 113 to 117).

This order of December 9, 1929 is the one here sought to be set aside.

THE ISSUES PRESENTED

The assignment of errors (R. 173–180) and the points upon which appellants rely (R. 816–820) show in detail the grounds on which it is sought to annul the order of the Commission, and a short summary thereof is:

1. There was neither evidence nor definite findings justifying the regulation of all intrastate rates; and

2. The order attempts to regulate intrastate rates based on future action of the railroads; and

3. The order prescribed joint line differentials which create discriminations against intrastate shippers; and

4. The order purporting to bring intrastate rates into harmony with interstate rates conflicts with the limitations put on the Federal Commission by the Constitution, the Interstate Commerce Act and the decisions of the Supreme Court; and

5. The order cannot be sustained under Sections 3 or 13 of the Interstate Commerce Act; and

6. There was no adequate and fair hearing; and

7. These reasons combined show arbitrary action by the Interstate Commerce Commission.

In discussing these summarized grounds, we shall make references to applicable facts and findings relating to each. The Court is requested to consider this brief as supplemental to the more detailed brief filed by the appellant, Georgia Public Service Commission.

PRINCIPLES APPLICABLE TO ALL APPELLANTS' CONTENTIONS

As constitutional issues are presented *, such issues must be submitted

> "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289(†)."

The Commission has the power to protect interstate commerce from being regulated or burdened by intrastate rates, but in the absence of a specific finding supported by substantial evidence of such burden or regulation it has no power "to establish a unified control"‡.

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*It is claimed that the Commerce Clause (Errors 1 and 2, R. 174), the Interstate Commerce Act (Error 2, R. 174, Error 7, R. 176, Error 12, R. 177), and the Fifth Amendment (Error 7, R. 176, Error 19, R. 179) were violated by the orders assailed.

† See also in Manufacturers' R. Co. V. United States, 246 U. S. 457, at pl 488, where the court, speaking through Pitney, J:, said:: "So long as the Commission proceeds in accordance with the requirement of the Commerce Act, its administrative orders * * * if made after due hearing and supported by evidence, are not subject to attack in the courts. But the cases recognize that matters of constitutional rights are not to be conclusively determined by the Commission.'

Mississippi Railroad Commission v. Illinois Central R. R. Co., 203 U. S. 335, 344;

Bluefield Improvement Company v. Public Service Commission, 262 U. S. 679, 688;

Beidler v. South Caroline Tax Commission, decided Nov. 24, 1930, preliminary print 282 U. S. 1, and cases cited in note.

‡ Houston E. & W. T. Ry. Co., v. United States, 234 U. S. 342, 357.

Before the Federal authority can regulate commerce wholly within one state there must be "certainty and precision". (*), a "high standard of certainty" "substantial disparity"(†), and "the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic"(**).

In Florida v. United States this court emphasized these principles (††).

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* Chicago, M. & St. P. R. Co., v. State Public Utilities Com. of Illinois, 242 U. S. 333, 357.

† Railroad Com. of Wisconsin v. Chicago B. & Q. R. Co., 257 U. S. 563, 579, 590, 591.

** American Express Co. v. South Dakota, 244 U. S. 617, 625, 626.

†† Decided January 5, 1931, 75 L. ed. advance pamphlet 212, 219, 282 U. S. 194, 211-12.

1. There was neither Evidence nor Findings of appropriate definiteness supporting the Order prescribing Intrastate Rates.

A. Statement of Facts.

The table(*) set out in the report of the Interstate Commerce Commission of December 9, 1929 (R. 94) illustrates the differences between the interstate rates prescribed by this Commission in its report of January 21, 1927, and the rates promulgated by the order of the Georgia Commission of March 13, 1928. It will be noted that up to 200 miles the Georgia

	Single Line			Joint Line		
Miles	I. C. C. Docket 17517	Georgia Comm. order 3-13-28	Differences	I. C. C. Docket 17517	Georgia Comm. order 3-13-28	Differences
	Cents	Cents	Cents	Cents	Cents	Cents
10	50	50		65	50	—15
20	55	55		70	55	—15
30	60	60		75	60	—15
40	70	70		85	70	—15
50	80	70	—10	95	70	—25
60	80	80		95	80	—15
70	90	80	—10	105	80	—25
80	90	90		105	90	—15
90	100	90	—10	115	90	—25
100	100	100		115	100	—15
110	110	100	—10	125	100	—25
125	110	110		125	110	—15
130	120	110	—10	135	110	—25
150	120	120		135	120	—15
160	130	120	—10	140	120	—20
175	130	130		140	130	—10
190	135	130	— 5	145	130	—15
200	135	140	+ 5	145	140	— 5
220	140	140		150	140	—10
230	140	150	+10	150	150	
250	150	150		160	150	—10
260	150	160	+10	160	160	
280	160	160		170	160	—10
290	160	170	+10	170	170	
320	165	170	+ 5	175	170	— 5
360	175	180	+ 5	180	180	
400	185	190	+ 5	190	190	
440	195	200	+ 5	200	200	
460	205	210	+ 5	210	210	

—Georgia Public Service Commission Scale lower than 17517 scale.
+Georgia Public Service Commission Scale higher than 17517 scale.

scale is, in some instances, the same as the interstate single line scale and in other instances the Georgia scale is less, generally by ten cents. At 200 miles and beyond, the Georgia scale is, in some cases, the same as the interstate single line scale but is generally higher than the latter by amounts ranging from 5 to 10 cents. The Georgia scale is less than the interstate joint scale by amounts ranging from 5 to 25 cents, except that for the longer hauls the two scales are the same in certain instances.

Different minimum carload weights were prescribed by the Federal Commission and the Georgia Commission. The Interstate Commerce Commission found that the evidence did *not* justify a finding that the minimum weights prescribed by the Georgia resulted in undue preference and advantage to Georgia shippers or in unjust discrimination against interstate commerce (R. 112).

The report of December 9, 1929, of the Federal Commission compares the revenues under the Georgia rates prescribed on March 13, 1928 upon a limited number of shipments moving during prescribed periods over certain lines with revenues that would have accrued under the new interstate rates prescribed by the Federal Commission in its report of January 21, 1927 (R. 100 to 101). No evidence was introduced to show the total revenues which would be received under the new Georgia rates upon all intrastate shipments as compared with the revenues that would be received upon such shipments under the new interstate rates. The Interstate Commerce Commission did not find that the new Georgia rates would be unremunerative.

The investigation of the Georgia rates was instituted by the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act (R. 89). There is no basis for any claim that Section 15 (a) can be used to support the Commission's findings. No pleadings testimony or "findings of proper explicitness", or otherwise, relate thereto (*). Neither the Commission nor the trial court relied on such claim.

The purpose of the Interstate Commerce Commission seems to have been to harmonize the interstate and intrastate rates regardless of whether or not there was any violation of the law shown. This purpose, clearly evidenced in the Commission's opinion in this case, ignored prior decisions of this court (†) and runs directly counter to the opinion in Florida v. United States, ante.

In its opinion of January 21, 1927, the Commission said:

> "* * * it is felt that the Georgia commission will cooperate in authorizing such revisions as may

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* In Florida v. United States, 282 U. S. at 208, this court dealing with a similar situation said: "It would be an extreme and unwarranted assumption that to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida. Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it. Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 507, 508, 62 L.ed. 425, 437, P. U. R. 1918C, 279, 38 S. Ct. 170; Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579, 580, 66 L.ed. 371, 379, 380, 22 A. L. R. 1086, 42 S. Ct. 232; New York v. United States, 257 U. S. 591, 600, 66 L.ed. 385, 390, 42 S. Ct. 239. The district court, again examining the record upon the rehearing, reaffirmed its opinion that there was no such evidence, and it is sufficient on this appeal to observe that there are no findings of proper explicitness to that effect."

† Arkansas Ry. Com. v. Chi. R. I. & P. R. Co. 274 U. S. 597; Houston East and West Texas Ry. v. United States, 234 U. S. 342; Illinois Cen. R. Co. v. Publ c Utilities Com. 245 U. S. 493; Railroad Com. of Wisconsin v. Chicago B. & Q. R. Co. 257 U. S. 563, 566; New York v. United States, 257 U. S. 591, 601.

be necessary to bring their rates *into harmony* with the interstate adjustment herein approved." (R. 59) (Italics ours.)

In its order of June 4, 1928, the Interstate Commerce Commission instituted a new hearing to consider the lawfulness of the intrastate rates prescribed by the Georgia Commission on March 13, 1928, In its order the Commission referred to its prior report and said:

> "* * * it was felt that the Georgia Public Service Commission would cooperate in authorizing such revision in the intrastate rates within Georgia as might be necessary to bring such rates *into harmony* with the interstate adjustment prescribed as aforesaid" (R. 86) (Italics ours.)

and:

> "That a petition has now been filed on behalf of carriers respondent in number 17517 * * * in which it is averred that the Georgia Public Service Commission * * * required petitioners to establish rates * * * which are *not in harmony* with * * * the rates required to be established by the Commission for interstate traffic." (R.87) (Italics ours.)

In the second opinion of the Commission, dated December 9, 1929, the Commission states that:

> "* * * the respondent carriers filed with us their supplemental petition setting forth, among other things, that the aforesaid rates prescribed by the Georgia commission are *not in harmony with* * * * the 17517 scales." (R. 92) (Italics ours.)

and:

"Respondents and others complained and are here contending that this intrastate revision is so *out of harmony with* the approved interstate revision that it has brought about an unlawful relationship." (R. 93) (Italics ours.)

The whole theory of the Interstate Commerce Commission seems to have been based upon the idea of "harmony", while the Supreme Court of the United States, in the Wisconsin Case, bases the right to control state rates on "substantial disparity". In Chicago, Milwaukee & St. Paul Railway Company v. State Public Utilities Commission of Illinois, 242 U.S. 333, the state rates were lower than the interstate rates, yet the Supreme Court said, at page 338:

"Some relation we may admit between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in Houston, E. & W. T. R. Co., v. United States, 234 U.S. 342 * * *, but leaves it controlled by the Minnesota Rate Cases, supra; Oregon R. & Nav. Co. v. Campbell, 250 U.S. 525 * * *; and Louisville & N. R. Co. v. Garrett, 231 U.S. 298 * * *. Therefore, the order is not subject to the charges against it, and sections 3, 13, and 15 of the Interstate Commerce Act have no application."

In the Wisconsin Case, 257 U.S. 563, at page 579 the Supreme Court uses the phrase "high standard of certainty" and in the Arkansas Case, 274 U.S. 597, at 603, the Supreme Court said:

"The intention to interfere with the state function of regulating intrastate rates is not to be presumed."

B. Argument and Authorities

It is, however, unnecessary for us further to demonstrate the lack of evidence bringing this case within the rule that intrastate rates must not be so low as to be a burden on interstate commerce because the Commission made no findings supporting any such claim and this court has said in the Florida Log Case (Florida v. United States, supra) "there should be appropriate *findings* upon *evidence* to support an order * * *"

The Commission not only did not make findings appropriate to an order regulating rates throughout the State of Georgia, it could not under the evidence in the record have made such findings. The order of the Commission here assailed, therefore, is not authorized under any power delegated to the United States (Constitution, Art. I, sec. 8, clause 3), and invades the field of reserved rights of the State of Georgia (Constitutional Amendment X).

The Florida Log Case, above, which supports this conclusion, is not different in this respect from the former decisions of this court. That decision follows the Shreveport case(*) and other cases heretofore decided by this Court. In the Shreveport case, page 357, it was said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified con-

* Houston E. & W. T. R. Co. v. United States, 234 U. S. 342; Florida etc. R. Co. v. United States, 234 U. S. 167; American Express Co. v. South Dakota, 244 U. S. 617; Illinois Central R. Co. v. Public Utilities Com., 245 U. S. 493.

trol by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the Commission of unjust discrimination, intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states."

II. THE ORDER ASSAILED ATTEMPTS TO REGULATE INTRASTATE RATES BASED ON FUTURE ACTION OF THE RAILROADS.

This point is discussed at length by Judge Sibley in the opinion of March 3, 1930, refusing an interlocutory injunction, 39 F. (2d) 167 (R. 165–6). At page 170 Judge Sibley, in speaking of the order of December 9, 1929, said:

> "The writer thinks it means to operate automatically in the future whenever interstate rates may be altered, and, that thus intended, it is unlawful."

but strange to say, this point is not mentioned in the opinion upon final hearing.

The order of December 9, 1929, is set out at record 113 to 116. In the second paragraph of the order as same appears at record 115, the Commission ordered the railroads –

> "to establish on or before March 3, 1930, and *thereafter to maintain* and apply to the intrastate transportation of sand * * * between points in the State of Georgia, rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities * * *" (Italics ours.)

It will be noted from the above that the railroads were ordered "thereafter to maintain" rates not lower than those *contemporaneously applicable* in interstate commerce. The words "thereafter to maintain" are not limited in any manner to the rates which were "contemporaneously applicable" at the time the order was entered on December 9, 1929. Without such limitation, the plain construction of the order is that it was intended to operate automatically in the future whenever interstate rates may be altered. Thus intended, the order is clearly unlawful.

Under the order of the Commission it is extremely doubtful what the Commission meant by prescribing minimum rates not lower than the interstate rates "contemporaneously applicable." At the Atlanta hearing Mr. Price testified that:

> "The rates fixed by the I. C. C. in Docket 17517 are maximum rates, and our investigation shows that in many instances the carriers are publishing lower rates than the scale." (R. 755)

and at record 756 through 760 this witness supported his statement by a large number of references to interstate rates which were lower than the 17517 scale. At page 170 of 39 F. (2d), in the opinion rendered upon the application for an interlocutory injunction the court stated that "the record does not show what the exact situation is" with respect to minimum interstate rates which were lower than the interstate scale and that on this account the matter could not be adjudicated. This defect was remedied by the introduction of the record at the final hearing, and from record 756 through 760 instances of interstate rates lower than the scale prescribed by the Interstate Commerce Commission are stated. These interstate

rates lower than the scale mentioned are not an "exceptional situation" but are so general as to render uncertain and invalid the entire order of December 9, 1919.

At record 799 the witness Harry T. Moore introduced his Exhibit 196-B and in referring to this exhibit, Mr. Moore was asked the question at record 800:

> "Q. And it also illustrates (Exhibit 196-B) does it not, Mr. Moore, that in numerous instances the carriers are not now collecting the full 17517 scale?"

and replied:

> "A. That is true."

III. The Order Prescribes Joint Line differentials which create Discriminations against Intrastate Shippers.

The new interstate rates on sand, etc., contrary to the system adopted on fertilizers, brick, and other heavy commodities differ for single and joint line hauls. The State's scale makes no difference in the rates on single and joint line hauls.

At record 740 the witness Price testified:

> "Subsequent to the Southern Class Rate Case, I.C.C. docket 13494, the Georgia Commission has adopted and put in force the class rates prescribed by the Interstate Commerce Commission, and has also revised the rates on fertilizer, sugar, roofing, wooden building material, cement, lime, brick, sand and gravel, iron and steel articles. The Georgia Commission did not provide any

joint line differentials on any of these commodities, except on brick, in which case the Georgia Commission approved the rates which had been approved by the Interstate Commerce Commission in its docket I. & S. 1885, and the joint line differentials on brick faded out at 80 miles.

"It is correct to say that in prescribing rates on sand and gravel in its first order, effective April 1, 1925, the Georgia Commission did provide for joint line differentials under 100 miles, but when these rates were again revised, effective May 1, 1928, the single line rates were generally increased and all joint line differentials eliminated."

The state rates are about the same, perhaps a little higher, than the interstate single line rates. There is available to interstate shippers into Georgia single line hauls covering much more mileage than is available to intrastate shippers in Georgia. This is illustrated by Exhibit 187-B introduced at record 792. The interstate joint line rates are generally, although not always, higher than the state's single line rates. The principal interstate shippers located at Birmingham, Chattanooga, and Columbia, ship into the larger markets in Georgia on single line rates. If the Georgia Commission had made two lines of rates, it would have created unjust discrimination among its own shippers. While exhibits are numerous as illustrative of the situation, those of H. T. Moore, Exhibits 188-B through 193-B, are typical (R. 793 to 797).

On Exhibit 188-B, record 793, are shown rates from Alabama City, Alabama, to points in Georgia, and the Georgia scale rates applicable for the distance to each of these points. The Georgia scale is the same

as the interstate rates to 26 points, lower to 7 points, and higher to 44 points. If Graysville, the Georgia producing point used in this exhibit, had to pay the joint line interstate scale, such rates would to all the points named in the exhibit be higher for similar mileages than the interstate shippers at Alabama City would pay. Exhibits 189-B through 193-B show similar situations as to other points in and out of Georgia (R. 794 to 797), and clearly portray the disadvantage to the Georgia shipping points under joint line differentials. Other such exhibits are numbered 194-B to 196-B (R. 797–9).

At record 800 the witness H. T. Moore said:

> "In conclusion, I would like to make this statement, that in our opinion the only purpose a differential can possibly serve is to create an artificial rate situation calculated to give some community an advantage to which its geographical location does not entitle it. This conclusion is in accord with views expressed by the Interstate Commerce Commission in 101 I.C.C. 603."

At record 731 the witness Price, for the Georgia Commission said:

> "In view of the location of the Georgia industries it was and is the expressed judgment of the Georgia Commission that, to provide rates on basis of combination, or with joint line differentials for any extended distance, would have the effect of causing undue discrimination between the Georgia shippers, that is, against certain shippers in Georgia, in favor of other shippers in Georgia, and would also cause discrimination against the Georgia shippers in favor of shippers with plants at Montgomery, Ala., Birmingham, Ala., and Chattanooga, Tenn."

and illustrated the above quotation in his testimony at record 732 to 733 by making use of the map introduced as Exhibit 161-B.

At record 741 Mr. Price stated:

> "As we have shown by exhibits (161-B to 165-B) which I have filed, if joint line differentials should be applied to the rates on sand, gravel, and crushed stone in Georgia, it would have the effect of causing discriminations between the producers and shippers of these materials in Georgia, and would also cause discrimination against the shippers in Georgia in favor of shippers at Birmingham and Montgomery, Ala. For this reason I am of the opinion that the Georgia Commission was clearly justified when it provided a common scale to be applied for both single and joint line, the rates provided in this scale being generally higher than the rates previously in effect in Georgia." (Parenthesis ours).

As has been stated heretofore, Exhibit 161-B is a map of the State of Georgia showing the location of some of the sand, gravel, and crushed stone industries in Georgia and also the railroads in Georgia. To give a more complete picture of the Georgia situation the witness Price introduced in evidence the series of exhibits numbered 169-B through 177-B (R. 746 through 752). These exhibits, in connection with the explanation thereof by Mr. Price, at record 746 through 752, show the discrimination that would be created among the Georgia industries if the full measure of the maximum interstate rates prescribed by the I.C.C. should be made to apply in Georgia. Mr. Price testified that the specific instances of discrimination shown at record 746 through 752 are shown in detail in exhibits 169-B through 177-B. At record 763 the witness Price introduced his Exhibit 179-B and stated:

"The purpose of this exhibit is to show the inconsistencies and the fourth section departures that are now being practiced on interstate traffic.

"This exhibit also shows that if the Georgia scale was applied these inconsistencies and fourth section departures would be removed."

At record 764 Mr. Price stated:

"My exhibit No. 180-B is a statement of rates on sand and gravel from Montgomery, Ala. to destinations on the Atlanta, Birmingham & Coast Railroad, between Cordele and Fitzgerald, Ga., inclusive. Both the Seaboard Air Line Railway and the Atlanta, Birmingham & Coast Railroad serve Fitzgerald, Ga., which is just south of Cordele, Ga. The rate from Montgomery to Fitzgerald is 140 cents, whereas it will be noted that the rates to all intermediate stations from Westwood to McKenzie, Ga. are higher than the rate to Fitzgerald, which is a departure from the fourth section, and a discrimination against these intermediate points in favor of Fitzgerald.

"At Westwood the distance from Montgomery is 205 miles, and the rate 150 cents, whereas, at Fitzgerald the distance is 206 miles, and the rate 140 cents, or 10 cents less than to Westwood."

The order of the Interstate Commerce Commission under attack creates an unjust prejudice against intrastate shippers in Georgia and an undue preference in favor of interstate shippers shipping into Georgia. In the scale prescribed for interstate shipments a maximum rate is provided and the interstate carriers are permitted to make groups and the long lines are permitted to meet the rates of the short lines. While, intrastate in Georgia, shipping points 4 miles apart are not permitted to be grouped and the longer lines

are not permitted to meet the rates of the short lines.

At record 741 through 743, Mr. Price cited numerous dockets considered by the Interstate Commerce Commission, in which it did not prescribe joint line differentials. At record 743 Mr. Price said:

> "* * * the tendency at least has been to prescribe rates without joint line differentials."

See Alabama v. United States, Docket 513.

AUTHORITIES

The order of the Interstate Commerce Commission of December 9, 1929, attempted to displace and supersede the order of March 13, 1928, issued by the Georgia Commission. In its order the Interstate Commerce Commission prescribes rates with joint line differentials for application intrastate in Georgia. Such rates have the effect of causing undue discrimination against shippers in Georgia in favor of other shippers in Georgia and cause discrimination against the Georgia shippers in favor of shippers with plants located at Montgomery, Birmingham, Alabama; Chattanooga, Tennessee, etc. *The Interstate Commerce Commission should not be the breeding place of discrimination.* Under the facts of this record the latter Commission had no power to enter the order of December 9, 1929, and the enforcement of the order should be enjoined by this court. To sustain the order here attacked it is necessary to allow the non-discriminatory rates of the Georgia Commission to be replaced by the highly discriminatory system of rates prescribed by the Interstate Commerce Commission. Such an arbitrary and

unreasonable order is not binding upon this court.(*)

IV. The Order under Attack is Predicted upon an Assumed Power to "Harmonize" State and Interstate Rates.

In its opinion of December 9, 1929, the Commission finds that in so far as intrastate rates are lower than interstate rates there is unjust discrimination against interstate commerce. The order of December 9, 1929, requires such claimed unjust discrimination to be removed by prescribing a schedule of rates set up as an appendix to the order. In many instances, the rates shown in said schedule *lower* intrastate rates. Obviously, intrastate rates prescribed by the Georgia Commission, which are higher than the interstate rates, could not discriminate against the lower interstate rates. Over such intrastate rates the Interstate Commerce Commission has no jurisdiction.

No power inheres in the Interstate Commerce Commission to bring interstate and intrastate rates *into harmony*. The "harmony" theory is a creation of the Interstate Commerce Commission and is unsupported by statutory provision or sanction. Such theory is an effort by the Commission to increase its powers. The application of the theory conflicts with the limitations put upon the Commission by the Constitution, the Interstate Commerce Act and the decisions of the Supreme Court interpreting said act.

* Int. Com. Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L.ed. 431, 33 Sup. Ct. 185, citing Int. Com. Com. v. Union Pac. R. Co., 222 U. S. 541, 56 L.ed. 311, 32 Sup. Ct. 108; Tang Tun v. Edsell, 223 U. S. 673, 681, 56 L.ed. 606, 32 Sup. Ct. 359; Chin Yoh v. U. S., 208 U. S. 8, 13, 52 L.ed. 369, 28 Sup. Ct. 201; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L.ed. 1165, 32 Sup. Ct. 734; Zakonite v. Wolf, 226 U. S. 272, 56 L.ed. 218, 33 Sup. Ct. 31; United States v. B. & O. S. W. R. R., 226 U. S. 14, 57 L.ed. 104, 33 Sup. Ct. 5, 9; Atlantic C. L. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, 20, 51 L.ed. 933, 27 Sup. Ct. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301, 45 L.ed. 194, 21 Sup. Ct. 115, Anchor Coal Co. v. U. S., 25 F. (2d) 462, 471.

A difference between interstate and intrastate rates is not unlawful per se. The Georgia intrastate rates are fixed upon a different basis than are the interstate rates. The intrastate rates are the same whether the shipment is over one or more lines. The interstate rates are higher when the shipment is over more than one line.

The only rate evidence introduced at the November 1928 hearing by the railroads merely showed that the Georgia intrastate rates differed from the new interstate rates. Mr. Doss and Mr. Crane were the principal witnesses for the railroads. Mr. Doss began his testimony at record 619. At record 621 he introduced Exhibit 98-B comparing the Georgia intrastate rates with the interstate rates prescribed on January 21, 1927. Exhibit 99-B, record 621, compares the trunk line scales prescribed in the report of January 21, 1927, with the Georgia rates ordered into effect on March 13, 1928, by the Georgia Commission. Exhibit 100-B, record 623, compares the intrastate and interstate rates to forty-six destinations, and Exhibit 101-B, record 625, is a map showing the location of the forty-six destinations. Exhibit 102-B, record 625, shows the destinations and rates to various Georgia points from one point in South Carolina and several points in Georgia.

At record 626 the following occurred:

> "Q. (By Mr. Gwathmey) Mr. Doss, is uniformity in the mileage scales applicable on the commodities between points in the so-called Southern territory, exclusive of the Florida peninsula and intrastate between points in the states other than Florida served by the Atlantic Coast Line, a necessary and desirable thing, in your opinion?"

and over the objection of Mr. Burchmore, at record 626, the witness was allowed to answer, and said:

> "In my opinion, the transportation and other conditions on the lines of the Atlantic Coast Line other than in the peninsula of Florida are such that varying levels of rates on these commodities are not justified and cannot be operated without causing discrimination and trouble."

The witness Crane introduced a number of exhibits. His Exhibit 105-B, record 652, merely shows the former Georgia scale, the present Georgia scale, and the interstate scale. Exhibit 108-B, (R. 654) and Exhibit 109-B (R. 655), merely compare the Georgia rates from specified points with interstate rates from other points. This witness introduced other similar rate comparisons and exhibits at record 656-667.

None of the exhibits introduced by the railroads pretended to show that the Georgia rates were unreasonable. The exhibits merely showed that the Georgia rates were different from the interstate rates.

In United States v. Illinois Central R. Company, 263 U.S. 515, at 524-5, 68 L.ed. 417, at 425, the Supreme Court said:

> "To bring a difference in rates within the prohibition of sec. 3, it must be shown that the discrimination practised is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not

shown to be unreasonable low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. American Exp. Co. v. Caldwell, supra.

> "Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it. The Commission found, among other things, that the cost of the service from Knoxo was not greater than the cost of the transportation from many other points which enjoyed the lower rate; that the value of the service was the same; and that other traffic conditions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying a lower rate that the prejudice to which the Swift Lumber Company had been subjected was undue and unreasonable."

No such facts were found in connection with the sand and gravel rates as are discussed in the above quotation. There is no substantial evidence in the record to show that the Georgia rates are unlawful under sections 3 or 13 of the Interstate Commerce Act.

V. The Order cannot be Sustained under Sections 3 or 13 of the Interstate Commerce Act.

The Interstate Commerce Commission entered a statewide order to *harmonize* all state rates in Georgia with interstate rates ordered into effect in the original report. Such order will include many rates not within the proper class or the reason of the order. As shown at record 94 the Interstate Commerce Commission found that some of the new Georgia rates were higher than the new interstate rates. Such intra-

state rates could not discriminate against the interstate rates. At record 95 it appears that the minimum carload weight prescribed by the Interstate Commerce Commission in connection with the 17517 scales is different from the minimum weight prescribed by the Georgia Commission in connection with its scales. At record 112 it appears that the Interstate Commerce Commission did *not* find that the minimum weight prescribed by the Georgia Commission would result in undue preference or unjust discrimination. The decision of the Commission and the motion for rehearing filed by the Georgia Commission (Exhibit E, R. 118) show that the mileage under the Georgia rates is arrived at differently than under the new interstate rates.

At record 776 the witness Price testified:

> "The rule of the Georgia Commission is entirely different from the rule for computing mileages as fixed by the Interstate Commerce Commission in docket 17517, in that under 17517 a carrier is required to compute the rate via the shortest route, the rate making route, and via junctions where carload traffic may be interchanged without the transfer of lading, and that becomes the rate regardless of how you move the traffic, as I understand the order, you have no option in the matter. The Georgia Commission's order does not require that."

The new interstate rates and the new Georgia rates are not comparable. Exhibit 163-B (R. 735) shows the rate of progression of the Georgia scale. Exhibit 164-B (R. 735) shows the rate of progression of the 17517 scale. At record 735 Mr. Price stated in reference to Exhibit 164-B,

"Attention is directed to what we consider an inconsistency in the rate of progression of the rate. It will be noted that the mileage blocks are made up of 10 miles, 20 miles, 25 miles, 30 miles, and 40 miles, but the rate is not graded uniformly with the mileage blocks."

The fact that the larger part of the interstate shipments moves on single lines and that many, if not most, of the Georgia producers must use joint lines for the greater part of their shipments so distinguishes the rates as to remove all relationship on which a violation of Section 3 or 13 of the Act could be based.

AUTHORITIES

Invasion of the field where intrastate rates are made is never permitted without substantial justification.

In United States v. Illinois C. R. Co., 263 U.S. 515, it was held:

"Mere discrimination does not render a rate illegal under section 3 of the Act to Regulate Commerce, but, to be obnoxious to the section, the discrimination must be unjust."

In Railroad Commission of Wisconsin v. C. B. & Q. R. Co., 257 U. S. 563, the Court said:

"It (this power) does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this respect should be directed to *substantial disparity* which operates as a real discrimination against, and obstruction to, interstate commerce." (Italics and Parenthesis ours).

See also Arkansas Ry. Com. v. C. R. I. & P. R. Co., 274 U.S. 597.

Under the principles announced in the cases last cited, the order of December 9, 1929, is invalid.

There was no such relationship shown in the record as constituted a violation of Section 3 and the evidence shows that some at least of the specific violations claimed to exist were, if violations, produced by different carriers, and were no basis for a general finding under Section 3. The Commission itself found that as to rates from Chattanooga no violation of the law was shown (R. 112).

Unquestionably, where there is shown a broad general violation of Section 3, it is not necessary, as found by the Supreme Court, to go into every particular rate, but where, as here, it is shown that there are differing circumstances and conditions and that as to some rates there is no violation, it is erroneous by a general order to reach and change all intrastate rates. The constitutional power to do this does not exist in Congress, nor was any such power sought to be conferred on the Interstate Commerce Commission.

VI. THERE WAS NO ADEQUATE AND FAIR HEARING.

HISTORY OF PROCEEDINGS

The original petition of the carriers to the Interstate Commerce Commission alleged that the Georgia state rates brought about by the order of the Georgia Commission of February 25, 1925, were unlawful in their relationship to the then *existing interstate rates*. In its opinion of January 21, 1927, the Interstate Commission said

"Considering the results brought about by this order (referring to the order of February 25, 1925, of the Georgia Commission) it could not be found from this record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce." (R. 59) (Parenthesis ours).

In the original hearing the Interstate Commerce Commission considered only two sets of rates, to-wit: (1) the rates ordered into effect by the order of the Georgia Commission of February 25, 1925; and (2) the *existing* interstate rates, and found that the Georgia rates did not discriminate against the existing interstate rates.

In its original report of January 21, 1927, the Interstate Commerce Commission prescribed a *new* set of interstate rates but did *not* make any finding or enter any order for the future to the effect that the Georgia rates of February 25, 1925, were unjustly discriminatory against the new set of interstate rates.

On March 13, 1928, the Georgia Commission ordered into effect a new set of state rates which were higher than the state rates considered by the Interstate Commerce Commission in its original report. At record 737 Mr. Price, Rate Expert of the Georgia Public Service Commission, testified:

"The present rates in Georgia, which were made effective May 1, 1928, it will be noted for the most part, are higher than the joint line rates previously in effect in Georgia on sand, gravel, etc., and in most cases equal or are higher than the joint line rates on crushed stone, etc., in effect at that time, for distances above 100 miles.

"It will be noted that the present Georgia rates are generally equal to or higher than the maximum single line rates in I. C. C. Docket 17517, and for distances above 300 miles are the same as the maximum joint line rates in I.C.C. Docket 17517."

Thereafter the carriers filed a new petition with the Interstate Commerce Commission alleging that the new Georgia rates were unlawful in relation to the new interstate rates prescribed in the original report of the Interstate Commerce Commission. On June 4, 1928, the Interstate Commerce Commission passed an order based upon the petition of the carriers authorizing an investigation to determine the sole question of whether the rates and minimum weights which the carriers were required to maintain on sand, clay, gravel, crushed stone, and slag within Georgia under the order issued by the Georgia Public Service Commission on March 13, 1928, were unlawful in their relationship to the interstate rates and minimum weights which the Interstate Commerce Commission had prescribed as reasonable on the same commodities in its original report of January 21, 1927. A hearing was had in Atlanta, Georgia, on November 26, 27, and 28, 1928.

THE ATLANTA HEARING

At the Atlanta hearing the Examiner after stating, "I will make a brief statement of the issues", (R. 614) said:

"Upon petition of carriers respondent in No. 17517, Rates on Chert, Clay, Sand and Gravel within the State of Georgia, the Commission on the 4th day of June, 1928, reopened the said proceeding for further hearing on the sole question of whether or not the rates and minimum weights required by the Georgia Public Service Com-

mission to be maintained by the said respondent carriers on intrastate shipments of sand, gravel (washed or unwashed), clay gravel, crushed stone and slag, in relation to the interstate rates and minimum weights prescribed in its report and order on January 21, 1927, in said No. 17517, causes or will cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

"The Commission at the same time reopened its No. 17763, Roquemore Gravel Company, et al versus Atlanta, Birmingham & Atlantic Railway Company, et al, solely on the issue as to whether the intrastate rates and minimum weights maintained by defendants between points in Georgia on sand, gravel (washed or unwashed), clay gravel and crushed stone result in undue and unreasonable prejudice and disadvantage of complainants in No. 17763, in shipping sand, gravel (washed or unwashed) and clay gravel from Montgomery, Ala., and Chattanooga, Tenn., destinations in the state of Georgia."

Thereafter, Mr. Burchmore, representing the Georgia Public Service Commission, said at record 615-616:

"Mr. Examiner, on behalf of the Georgia Public Service Commission, I desire to present a point that as the issues are defined in your opening statement there is no jurisdiction in the Interstate Commerce Commission to enter an order in this proceeding which would have the effect or intended effect of making any change in the intrastate rates for the transportation of chert, clay, sand, gravel and other materials within the state of Georgia. That question is jurisdic-

tional and goes to the authority of the Interstate Commerce Commission under the terms of the interstate commerce act.

"I have a second point to urge, that the Georgia Public Service Commission objects to the use in the determination of the issues now presented by these proceedings of the testimony taken at the sessions of February 15, 16, 17, 18, 19, and 20, 1926, in docket No. 17517 and related cases, and the exhibits at that time offered, on three grounds:

"First, that the issues now presented to the Commission as defined by the order, and as defined by the complaint, and as defined by your opening statement, are not the same issues that were presented at that time, in those proceedings.

"Second, that the testimony then given throws no real light on the conditions now obtaining and which will obtain for the future, the question before the Commission having to do only with rates for the future and not for the past; that conditions have materially changed since February, 1926, a period of nearly three years, and that much of the matter then in evidence was immaterial to any issue now before the Commission, and much of it would be changed if now given, by reason of the changes in conditions.

"I desire to make that objection and ask that that record shall not be considered."

And, at record 616, Mr. Watkins, representing shipping interests, said:

"Mr. Examiner, on behalf of the shippers for whom I have entered an appearance, I wish to make the objection that under the pleadings in this case the Commission has no jurisdiction

whatsoever of the 13th section case, and that the petition in that case cannot be filed as a supplemental petition because it is based on facts arising after the hearing of the original case, and for the other reasons specifically set forth in my answer heretofore filed in this case."

Later, at record 617, Mr. Watkins said:

"In my statement of objections, I made no reference to the use of the record (meaning the record on the former hearing), because I did not think that question had arisen. Inasmuch as counsel have now stated that they expect that record to become part of this, I wish to register an objection to a consideration of that record here as part of this record, or as in the evidence offered in this record." (Parenthesis ours).

and:

"We do now object at any time when it may be opened to be considered, to any record heretofore made, the clients of mine not having been in the former case, and this being to them entirely new."

At record 617 the Examiner ruled:

"Gentlemen, as far as my ruling is concerned, my mind is pretty well made up. The record is open for the consideration of the matter involved in these proceedings, and I rule that it be considered so opened, and for whatever use the parties may wish to make of it."

and exception was taken.

Under the ruling of the Examiner made at the beginning of the hearing in Atlanta appellants were

denied the right to introduce evidence to show that the interstate rates prescribed in the original report of the Interstate Commerce Commission of January 21, 1927, were unreasonable and were precluded from introducing evidence as to conditions existing in 1928. Hence, although the Interstate Commerce Commission ordered the Atlanta hearing to ascertain whether the new Georgia rates and minimum weights of 1928 were unlawful in their relationship to the new interstate rates and minimum weights of 1927, no evidence was permitted to be introduced as to the reasonableness of the new interstate rates and appellants were not allowed to show the conditions existing in 1928. *Clearly no unlawful relationship could have existed if the new Georgia rates of 1928 were reasonable and the 1927 interstate rates were unreasonable.* The interstate rates of 1927, based upon evidence introduced in February 1926, might have been reasonable in 1927 – but unreasonable in 1928, due to changes in conditions. Obviously, whether the relationship between the 1928 Georgia rates and the 1927 interstate rates was unlawful would depend upon the reasonableness of the interstate rates. No adequate hearing was granted appellants because no evidence to show unreasonableness of the interstate rates was allowed.

AUTHORITIES

The Fifth Amendment to the Constitution of the United States and the Act to Regulate Commerce give the right to a full hearing and, as said by the Supreme Court in Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, orders of the Commission are void "if a hearing was denied; (or) if that granted was inadequate or manifestly unfair."

Since the hearing resulting in the order under attack related solely to the relationship between the new interstate rates and the new Georgia state rates and appellants were not allowed to show any facts concerning the unreasonableness of the new interstate rates or the conditions existing in 1928, the hearing was "inadequate and manifestly unfair." A state's rates can never be regulated by the Federal Agency until there is a specific comparison and hearing and testimony as to the rates interstate with which the state rates are contrasted. *On a finding on which the order is based there has been no hearing nor testimony.*

In Illinois Central R. Co. v. Railroad Commission of Wisconsin, 1 F. (2d) 805 state commission rates were sought to be set aside. There, as here, there had been no hearing as to particular rates nor as to the conditions existing when the order was made. The court said at page 806:

> "The question whether interstate rates are discriminatory as between shippers is one of which the courts have now no jurisdiction. There must be a hearing on that subject before the Interstate Commerce Commission and a finding by it. Texas Co. v. Abilene Co., 204 U. S. 426, 440. We see no reason for any different rule as to discrimination between interstate and intrastate rates."

As stated in the New England Divisions Case, Akron C. & Q. R. v. U.S., 261 U.S. 184, at 200:

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

In its final report of December 9, 1929 (R. 93), the Commission said:

> "Respondents and others complained and are here contending that this intrastate revision is so out of harmony with the approved interstate revision that is has brought about an unlawful relationship. For the purpose of determining whether or not this is the fact, the proceedings were reopened and the further hearing had. The scope of the further hearing was properly limited to the question indicated."

In upholding the Examiner in his ruling, excluding evidence as to the unreasonableness of the 1927 interstate rates and as to changed conditions the Commission unduly restricted its inquiries. In Skinner & Eddy Corporation v. U.S., 249 U.S. 557 the Court said:

> "Transportation conditions are not static * * *."

In Texas & Pacific Railway v. I.C.C., 162 U.S. 197, 40 L.ed. 940, the eleventh headnote reads:

> "If the commission has unduly restricted its inquiries upon a mistaken view of the law, the circuit court ought not to accept the findings of the Commission as a legal basis for its own action."

Any incidental testimony concerning the reasonableness of the interstate or intrastate rates was without the limitations fixed in the order for hearing and the issues as stated by the Examiner and does not affect the legal issues.

VII. The Action of the Commission was Arbitrary.

Contrary to its action in the Alabama Fertilizer

Case, Docket 513, the Commission prescribed single and joint-line scales of rates on sand in Georgia (R. 113 to 118). Perhaps the Commission may, upon substantial evidence and appropriate findings, prescribe either a single or a joint-line scale, but in this and the Alabama Case the Commission seems to have acted arbitrarily by prescribing something different than existed intrastate. In the Alabama Case all parties advocated single and joint-line scales of rates. The Commission prescribed a single-line scale. In the Georgia Case shippers in Georgia and the Georgia Commission advocated a single-line scale; the Interstate Commerce Commission prescribed single and joint-line scales.

The interstate rates alleged to bear an unlawful relationship to the intrastate rates were rates prescribed in January, 1927, based on testimony introduced in February, 1926. The Georgia intrastate rates were promulgated in March 1928. Appellants were not allowed to show the unreasonableness of the 1927 interstate rates, nor to show any changes in transportation conditions occurring since the evidence was introduced upon which the 1927 interstate rates were based.

There were no findings of the lack of revenue.

There are no such findings of fact in the opinion of the Commission, 160 I.C.C. 309 (R. 88), as justifies its conclusion as to intrastate rates in Georgia; and this Court has said in the Florida Log Case that a conclusion of the Commission such as here made, "would not only require evidence to support it but findings of appropriate definiteness to express it."

"Harmony" was the purpose of the Commission, regardless of lack of legal justification under the law for the prescription of such harmony.

Under these circumstances it was a legally arbitrary act to assume the control and regulation of all intrastate rates on sand, gravel etc. In the Wisconsin case (*), it was said:

> "It (this power) does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commerce in this regard should be directed to substantial disparity which operates as a real diserimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to Interstate Commerce." (Parenthesis ours).

It is respectfully submitted that the order assailed should be set aside.

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* Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 590, 591.